The Law Commission

Working Paper No. 78

Rights of Access to Neighbouring Land

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This Working Paper, completed for publication on 13 August 1980, is circulated for comment and criticism only.

It does not represent the final views of the Law Commission.

The Law Commission would be grateful for comments on this Working Paper before 30 April 1981.

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The Law Commission

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TABLE OF CONTENTS

	Paragraph	Page
PART 1 INTRODUCTION	1.1	1
Our terms of reference	1.2	1
This paper and our work on appurtenant rights	1.5	2
PART 2 THE EXISTING LAW	2.1	4
No general right of access	2.2	4
Particular cases where rights of access may exist	2.4	5
(a) Rights created expressly	2.5	6
(i) Easements	2.6	6
(ii) Other rights	2.8	6
(b) Rights not created expressly	2.9	7
(i) Implied easements	2.10	7
(ii) Easements acquired by long usage	2.15	11
(iii) Estoppel rights	2.16	11
(iv) Rights arising through breach of duty	2.17	12
(v) London Building Acts	2.20	13
A summing up	2.23	14
PART 3 THE QUESTION OF PRINCIPLE: SHOULD THERE BE SOME GENERAL MEANS OF OBTAINING ACCESS?	3.1	16
The case in favour	3.2	16
The case against	3.5	18
Provisional conclusion	3.10	20
PART 4 PRELIMINARY DISCUSSION: WHAT FORM SHOULD THE NEW RIGHT TAKE?	4.1	21

	Paragraph	Page
PART 5 THE DETAILS OF THE PROPOSED NEW SCHEME	5.1	24
The work	5.2	24
The property to be entered	5.8	28
Conditions	5.11	30
(a) An automatic condition: making good	5.12	30
(b) Other conditions	5.13	30
(c) The rationale of the conditions	5.16	34
The nature of the right	5.17	35
Persons entitled to apply for access	5.20	36
Persons against whom the application should be made	5.24	37
(a) Who can sue for trespass?	5.25	38
(b) The respondent class	5.28	39
(i) The primary category: occupiers	5.29	39
(ii) Possible extensions of the respondent class	5.34	41
(c) No one but the respondent class should have an action in trespass or nuisance in respect of work within the scheme or in respect of access for it	5.38	43
(d) Applicant's right to seek a stay of proceedings taken by members of the respondent class	5.41	44
Deciding the issues	5.42	45
(a) The tribunal	5.43	45
(i) The courts	5.44	45
(ii) The Lands Tribunal	5.45	46
(b) A preliminary procedure?	5.47	47
(i) The London Building Acts procedure	5.48	47

	Paragraph	Page
(ii) The advantages of a preliminary procedure	5.50	49
(iii) "Deemed consent"	5.53	50
(c) Guidelines	5.54	50
Costs	5.56	52
Enforcement	5.57	53
(a) Enforcement of right	5.58	53
(b) Enforcement of conditions	5.62	54
(i) When do the conditions arise?	5.63	54
(ii) Who can enforce the conditions?	5.67	55
(iii) How can the conditions be enforced?	5.70	57
Contracting out	5.72	58
PART 6 SUMMARY OF THE ISSUES		60

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THE LAW COMMISSION

Working Paper No. 78

RIGHTS OF ACCESS TO NEIGHBOURING LAND

PART 1 INTRODUCTION

1.1 This working paper has been prepared in response to a reference made to us by the Lord Chancellor on 3 August 1978 under section 3(1)(e) of the Law Commissions Act 1965[1].

Our terms of reference

1.2 The Lord Chancellor asked us

> "to consider the legal difficulties of those who, lacking the legal right to do so, need to enter upon another's land in order to inspect or do work upon their own, to consider whether these difficulties can be remedied by legislation and to make recommendations."

1.3 A very simple illustration of the problem may be given:

> X and Y are adjoining landowners. X's house is built very close to the boundary with Y's land. It needs repair and some of the repairs can be carried out only if X (or his builders) can obtain access to the flank wall by entering Y's land. Unfortunately X has no legal right to enter Y's land for this purpose and Y will not let him do so. The result may be that X's house falls inevitably into increasing disrepair.

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1 Section 3(1)(e) requires the Commission "to provide advice and information to government departments and other authorities and bodies concerned at the instance of the Government with proposals for the reform or amendment of any branch of the law".

1.4 But although many cases, perhaps most, will be of the simple kind just illustrated, this will not be true of all. Several people may have different proprietary interests (for example, as landlord and tenant) in the property which needs repair or in the neighbouring land to which access is sought. The work for which access is sought may not be repair, but something less serious in character (for example, decoration or the clearing of gutters) or something more serious (for example, complete demolition and rebuilding). Again, the piece of neighbouring property to which access is sought may not be a drive or path or some other area which is "vacant", but an area on which there is something already built (for example, a greenhouse or even the neighbour's house). It may be, indeed, that the property to be worked on and the property to be entered are not even side by side, for one may be on top of the other: the legal concept of "land" is wide enough to embrace flats, offices or other units of accommodation built in blocks, and in such cases the access required may be to the unit above, or the one below. These different situations pose problems which we shall have to consider in the course of this paper.

This paper and our work on appurtenant rights

1.5 We must discuss briefly the relationship between this paper and our work on appurtenant rights. Our Working Paper No. 36, dealing with Rights Appurtenant to Land, was published on 5 July 1971. Although consultation on that working paper has been completed long ago, we have only recently been able to resume work on its subject matter[2].

1.6 The access scheme which we provisionally propose in Part 5 of this paper does not involve the creation of rights which are "appurtenant" to land within the normal meaning of that term; so although we are concerned here with a problem which falls on the fringes of the area of law dealt with in

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2 We intend to deal with appurtenant rights in sections, turning first to positive and restrictive covenants.

Working Paper No. 36, it is nonetheless a distinct matter.

1.7 The problem with which we are concerned in this paper is that of a landowner who wants access to his neighbour's land in order to work on his <u>own</u> property. This problem must be distinguished from another problem which, though superficially similar, raises quite different issues and falls squarely within Working Paper No. 36 and not within this paper. We refer to the problem of a landowner who wants to do work to his <u>neighbour's</u> property. If, for example, one flat derives support from another, and the other is falling into disrepair, the owner of the first flat needs to repair, not his own flat, but the one underneath[3]. This, however, is not really a problem about access but about the substantive right to do the repairs. Someone who has the right to do the work itself will never lack an ancillary right of access in order to carry it out: he will have this latter right automatically, by necessary implication if not by express grant. What is lacking in these cases is the actual right to do the work; and the questions whether, and in what circumstances, this should exist will be left for consideration in the course of our work on appurtenant rights[4].

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3 Normally this problem is expressly dealt with in the leases or other documents relating to the flats, but this may not always be the case.

4 Similar considerations apply in relation to a wall which separates two properties owned by different people, who may be called A and B. In so far as the wall belongs to A he has a right, by virtue of his ownership, to repair it, and access for that purpose to B's land could be acquired through the scheme put forward in Part 5 of this paper. But in so far as the wall belongs to B (and if it is a party wall half may belong to each of them), the fundamental question is whether A has a right to repair it at all. If he has (probably because his property has acquired an easement of support from it), then he will automatically have any necessary right of access for this purpose. If he has not, then a mere right of access would be of no use to him. In neither case would he fall within the scope of this paper.

PART 2 THE EXISTING LAW

2.1 In this part of the working paper we consider the legal background to the problem.

No general right of access

2.2 There is in English law no general right of entry upon neighbouring land in order to do work on one's own property, even if the work consists of essential repairs. Unless a specific right has been created or has arisen in one of the ways mentioned below, a person who enters neighbouring land for this purpose and without consent is simply a trespasser.

2.3 This proposition, though already clear[5], has been strikingly illustrated in a case decided since the date of the Lord Chancellor's reference to us, John Trenberth Ltd. v. National Westminster Bank Ltd[6].

> In that case, the Bank owned premises which had become dangerous[7]. They abutted on a highway and the Bank had a statutory duty to maintain them in a safe condition. The Bank sought access to the neighbouring property in order to erect scaffolding and carry out the necessary repairs. They offered appropriate assurances and indemnities,

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5 Hewlitt v. Bickerton (1947) C.L.C. 10504; 150 Estates Gazette 421.

6 (1979) 39 P. & C.R. 104; 253 Estates Gazette 151.

7 Attention was drawn in this case to s.58(1) of the Public Health Act 1936, under which a local authority may obtain an order requiring the owner of a dangerous building to make it safe. Even if such an order were made, there appears to be no general power for the owner to enter neighbouring land in order to comply with it. (As to London, however, see para. 2.21 below.) But non-compliance enables the local authority to execute the order (s. 58(2)), and it seems that they would be able to enter neighbouring land by virtue of s. 287(1)(c), which gives them (subject to certain conditions) "a right to enter any premises.... for the purpose of ...executing any work... required by ... any order made under this Act" (emphasis supplied).

but the neighbouring owner did not consent and ceased after a time to answer letters. The Bank's builders then entered without consent and began to do the work. The neighbouring owner sought, by way of interlocutory relief, a court order for the removal of the scaffolding and injunctions restraining future entry.

The neighbouring owner was successful[8]. Walton J. held that although the actual damage caused to the neighbouring owner was "so slight that if an action were brought for it, it would hardly command the smallest coin of the realm"[9], the Bank and their builders were nonetheless trespassers against whom an immediately effective[10] injunction should and would be granted, because people "are not to infringe the property rights of others and then say, 'And I am entitled to go on doing it because I am really doing you no tangible harm, and fivepence will amply compensate you for that harm.'"[11]

Particular cases where rights of access may exist

2.4 Although there is no general right of access there are, as we have indicated above, several ways in which rights of access might come into being in particular cases. They might be created expressly, or they might arise in other ways.

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8 The case may be contrasted with Miller v. Jackson [1977] Q.B. 966 (C.A.); but see Kennaway v. Thompson (1980) Journal of Planning and Environment Law, August 1980, p. 515 (C.A.).

9 39 P. & C.R. at p. 107.

10 A plea that the injunction, though granted, should be suspended so that the work could be completed, was rejected. This course had been adopted in different circumstances in Wollerton and Wilson Ltd. v. Richard Costain Ltd. [1970] 1 W.L.R. 411, but that case had been doubted in the Court of Appeal (Charrington v. Simons & Co. Ltd. [1971] 1 W.L.R. 598, per Russell L.J. at p. 603) and Walton J. said in the present case that it "cannot be relied upon so far as suspension is concerned." See 39 P. & C.R. at p. 107.

11 39 P & C.R. at p. 107.

(a) Rights created expressly

2.5 If such rights are created expressly under the present law, they exist most commonly as easements; rights of this kind are therefore considered first.

(i) Easements

2.6 Easements are perpetual rights which are attached to and exist for the benefit of one piece of land (known as the dominant land) and are exercisable by the owner for the time being of that land over some other piece of land (the servient land). A dominant landowner may thus have an easement entitling him to enter adjoining servient land in order to do work upon his own land.

2.7 The grant of an express easement takes place sometimes as a separate, self-contained transaction, but more often on the conveyance or transfer of land; and an express easement of the kind we are considering would most usually be created on a single piece of land being first sub-divided for purposes of building, when the transfer or conveyance of each of the new units might include an easement allowing the owner to enter for certain purposes the unit or units adjoining his own.

(ii) Other rights

2.8 A right of access which exists as a legal easement may be said to enjoy the highest legal status, since it will enure through different ownerships of the servient and dominant lands and will usually be perpetual; but rights of access may be created in other ways. Thus one landowner may covenant with another that he will permit the other to enter his land. Equally, he may grant him a licence to do so. Indeed any valid agreement may operate to confer such a right. But rights created in these ways may not always have the durability and unassailabity of easements.

(b) Rights not created expressly

2.9 Rights of access may also come to exist otherwise than by an express act of the parties. In the paragraphs which follow we discuss briefly the ways in which this can happen, mainly with a view to showing that rights of the kind we have in mind will in fact seldom arise in any of these ways.

(i) Implied easements

2.10 Implied easements come into being when, and only when, the owner of a piece of land conveys or transfers part of it to a grantee and, although the conveyance makes no mention of an easement, the circumstances are such that the law treats one as having arisen.

2.11 One very limited group of implied easements may arise in favour either of the grantor or of the grantee. These are usually known as easements of necessity. They are listed in the judgment of Megarry V.-C. in Nickerson v. Barraclough[12]:

> "It seems clear that necessity may be relevant to rights of way in two distinct but overlapping ways. First, there may be a way of necessity, strictly so-called. Here the necessity is that without the way the land would be landlocked, and could not be used at all.... Second, the way may be necessary (a) for the enjoyment of some right expressly granted by the conveyance (as where the grant of a right to draw water from a spring will imply a right of way to the spring), or (b) in order to give effect to the common intention of the parties."

Rights of the kind we are considering could not arise under the first head. Limb (a) of the second head comprises ancillary rights of way which are necessary to the exercise of other rights expressly granted. We think there is no case in which a right of access of our kind could arise in this way, but we think limb (a) would also apply to cases in which

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12 [1979] 3 W.L.R. 562, at p. 566.

ancillary rights were necessary to the performance of obligations expressly undertaken, and cases of that kind might occasionally give rise to one. If, for example, A covenanted with B to maintain a wall on his (A's) land, and A could maintain it only by entering B's land, it seems that A would have a right of access for this purpose. But cases of this kind are rare in the extreme. As to limb (b) of the second head, there is perhaps a possibility that rights of our kind could occasionally arise as intended easements; but such easements are implied only when they are essential to the use of the premises in a way in which both parties intend that they shall be used, and it seems doubtful whether rights of access for the general purposes of repair would fall within this principle. So far as we know, there is no case in which such rights have been established in this way[13].

2.12 The remaining categories of implied easements are those which arise only in favour of the grantee. If certain facilities in the nature of easements (usually known as quasi-easements) are enjoyed over one part of the grantor's land for the benefit of another part, and he then conveys or transfers the benefited part, the facilities in question may be elevated to the status of full easements and attached permanently to the land of the grantee. This may happen under the rule in Wheeldon v. Burrows[14] or under section 62 of the Law of Property Act 1925[15].

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13 The circumstances in which rights of access might be claimed under this principle would seem to bear a close resemblance to those discussed in a slightly different context in footnote 21 below.

14 (1879) 12 Ch.D. 31 (C.A.)

15 See para. 2.14 below. Since s. 62 operates by deeming a conveyance of land actually to include a conveyance of of the quasi-easements as full easements, the grant is in a sense express rather than implied - but not in the sense in which we are using the term in this paper and not, it is submitted, in the sense in which most people would understand it, because the easements created through s. 62 may not be contemplated by either party.

2.13 The rule in Wheeldon v. Burrows would seldom serve to create easements of the kind with which we are concerned, because it applies only when the facilities in question have been "continuous and apparent"[16]. Whatever may be the precise meaning of this requirement[17] it could seldom be fulfilled by a facility which of its nature would be exercised only occasionally and of the existence of which there would normally be no visible evidence. Thus in Ward v. Kirkland[18], a cottage and a farmyard on which it abutted had once been in the same ownership and the cottage had subsequently been sold off. The current owner of the cottage claimed a right to enter the farmyard in order to maintain the cottage wall and clean the gutters and windows. He failed to make out his case under the rule in Wheeldon v. Burrows because the exercise of the facility to enter, though it had taken place during the period of common ownership, had not been "continuous and apparent".

2.14 Section 62 of the Law of Property Act 1925 is wider than the rule in Wheeldon v. Burrows, and is of more importance in the present context. It provides (so far as relevant):

> "A conveyance of land shall be deemed to include...all...ways...liberties, privileges...rights and advantages whatsoever,

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16 It is possible that the rule in Wheeldon v. Burrows applies also to cases in which the facility, though not continuous and apparent, was necessary to the reasonable enjoyment of the land granted: see the discussion in R.E. Megarry and H.W.R. Wade, The Law of Real Property (4th ed., 1975), p. 834. But in Ward v. Kirkland [1967] 1 Ch. 194, Ungoed-Thomas J. pointed out (pp. 224 and 225) "that there is no case in which positive easements which are not 'continuous and apparent' have been held to come within the doctrine of Wheeldon v. Burrows."

17 See Megarry and Wade, op. cit., pp. 834 and 835.

18 [1967] 1 Ch. 194.

> appertaining or reputed to appertain to the land, or any part thereof, or, at the time of the conveyance ... enjoyed with or reputed or known as part or parcel of or appurtenant to the land or any part thereof."

The "general words" thus cover all kinds of quasi-easements and not merely those which are continuous and apparent. In fact the claimant in Ward v. Kirkland[19], who failed to make out his case under the rule in Wheeldon v. Burrows, succeeded in an alternative plea under section 62. It is clear, therefore, that the section may be an important source of easements of the kind we have in mind; but of course it operates only when the two pieces of land in question have been in common ownership and when, during that ownership, a quasi-easement has been enjoyed[20]. It could therefore not operate if during the period of common ownership there had been no building on the land later sold off or, though there had been one, no work requiring access had been done on it[21].

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19 See para. 2.13 above.

20 It seems from Long v. Gowlett [1923] 2 Ch. 177 (approved by the House of Lords in Sovmots Investments Ltd. v. Secretary of State for the Environment [1979] A.C. 144, at p. 169) that a quasi-easement is not enjoyed for this purpose unless there is a separation of occupation as between the two pieces of land. This would restrict the operation of s. 62 still further in cases of this kind.

21 In Ward v. Kirkland [1967] 1 Ch. 194, Ungoed-Thomas J. referred (at p. 226) to words of Parker J. in Browne v. Flower [1911] 1 Ch. 219 at p. 224, which dealt with the possible effect of the doctrine that a grantor must not derogate from his grant. With hesitation, and obiter, he then expressed the view that an easement of access could be established on this alternative basis. If that is really so, it would seem that an easement might be established even if no work had been done on the building during the period of common ownership, and perhaps even if it had not been built at that time - provided, it seems, that the sale had been made "for the purpose of erecting a building" and erecting it, moreover, in a position in which an easement of access would be required. But in Woodhouse & Co. Ltd. v. Kirkland (Derby) Ltd. [1970] 1 W.L.R. 1185, Plowman J. (to whom Ward v. Kirkland was not cited) concluded that a positive right of this kind could not be acquired under the doctrine.

(ii) Easements acquired by long usage

2.15 If a facility has actually been enjoyed for a considerable period of years the law will in certain circumstances accord it the status of an easement. This may happen through prescription at common law, under the doctrine of the "lost modern grant", or by the Prescription Act 1832. We think it unnecessary to discuss the details of any of these methods here. They could operate to create an easement of access of the kind we have in mind, but they would seldom do so. For one thing, although it is not essential that the exercise of the facility be constant - if it is such that it would, by its nature, be exercised only spasmodically, then spasmodic exercise may suffice - there must be some element of continuity. For another, it is essential, if an easement is to be acquired, that the facility should not be exercised by the express permission of the owner of the servient land.

(iii) Estoppel rights

2.16 Recent cases have shown that the doctrine of equitable estoppel may have a part to play in relation to rights over land. Broadly, the doctrine comes into operation in this context when one landowner has acted (for example, by spending money on his property which he would not otherwise have spent) on a belief, engendered or encouraged by the other, that the other will allow him (or will continue to allow him) some particular facility of this kind. In such circumstances the doctrine may operate to prevent the withdrawal of an existing facility which could otherwise be freely withdrawn[22], or to make enforceable a new facility which

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22 E.R. Ives (Investments) Ltd. v. High [1967] 2 Q.B. 379 (C.A.). A second ground for the decision in this case was that the landowner against whom the right of way was claimed was himself enjoying a facility in respect of the claimant's land and "he who takes the benefit must accept the burden". See also Hopgood v. Brown [1955] 1 W.L.R. 213. This principle may occasionally operate by itself to improve the status of an entry facility.

could not otherwise be enforced[23]. Again, however, it is clear that such rights are rare and provide no general solution to the problem.

(iv) Rights arising through breach of duty

2.17 Another class of rights of entry may be worth mentioning here, not because the class is large or extensive - rather the contrary - but because we shall have occasion to refer to it again in later parts of this paper.

2.18 As a rule, A has a right to enter B's land in order to do work upon his own if the need for the work has arisen because of the breach of a duty owed by B to A. If, for example, A has acquired an easement of shelter for his own house from that of B, and B removes the shelter, it seems that A can enter B's land in order to remedy the situation. Gale on Easements[24] expresses it in this way:

> "It is a general rule of law that a person who suffers a nuisance is entitled to abate it. He may enter on to his neighbour's land in order to put an end to the nuisance. Thus, if there is a disturbance of an easement the owner of the dominant tenement may exercise this right of abatement."

The same principle would apparently apply if the nuisance consisted in an act by B which was inconsistent with a natural right enjoyed by A's land over his - for example, the natural right of support which one owner's land[25] enjoys from that of his neighbour.

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23 Crabb v. Arun District Council [1976] 1 Q.B. 179 (C.A.).

24 (14th ed., 1972), p. 356.

25 The natural right of support is confined to the land itself: there is no natural right to the support of building on the land, though an easement of support for buildings may be acquired.

2.19 But the precise extent of the rights of entry which arise in this way is by no means certain and it is clear that their exercise is fraught with risk. Certainly it is wise to give notice to the adjoining owner beforehand. Even then the person entering must recognise that the law does not favour abatement by a private individual and must beware of exceeding his powers. There is also an uneasy relationship between the right to abate a nuisance and the right to invoke other legal remedies through the courts: it is possible that the exercise of the one involves the loss of the other[26].

(v) London Building Acts

2.20 Finally, it is appropriate to mention the London Building Acts (Amendment) Act 1939, of which two distinct sets of provisions deserve discussion, though they are confined to London[27].

2.21 Part VII of the Act is concerned with dangerous and neglected structures. Owners may be required to deal with such structures, and in default the local authority may do so. Sections 141 and 142 of the Act, in combination with section 9 of the London County Council (General Powers) Act 1955, give powers of entry for this purpose to the owner and to the local authority, and these powers are expressly extended - in both cases[28] - to entry upon adjoining or adjacent land.

2.22 Part VI of the Act deals more generally with rights of building and adjoining owners. Section 45 contains provisions

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26 Gale on Easements (14th ed., 1972), p. 360.

27 Local legislation for similar purposes may apply in other parts of the country. Certainly provisions akin to those in Part VI of the 1939 Act are to be found in the Bristol Improvement Act 1847, as amended by the Bristol Corporation Act 1926.

28 Contrast the position under the Public Health Act 1936: see footnote 7 above.

designed to allow one landowner to build up to, or on, the boundary between his land and that of his neighbour. Section 46, and sections 47, 48, 49 and 55, are mainly concerned with walls and other structures which are already built on a boundary line. They are designed to allow certain work, including repairs, to be done to these structures by a landowner who does not own them (or does not wholly own them) or who would be unable for some other reason to do the work without the consent or co-operation of the adjoining owner. The relevance of these provisions for our purposes is that they are supplemented by an extensive and unequivocal right of access to the neighbouring land[29]; but of course they differ fundamentally both in scope and in purpose from the scheme which we put forward in this paper.

A summing up

2.23 Before we end this part of the working paper, one or two simple propositions should be emphasised. There is in our law no general right of access whatever for the purposes we have in mind. Such rights can exist only if they are created expressly or if they came into being in certain other ways. The express creation of such rights is comparatively rare - we discuss the reason for this in the paragraphs which follow - and the other means whereby they may arise are likely in practice to produce them in only a tiny proportion of the cases in which they may be needed.

2.24 Since express rights of access would provide a complete solution to the problem, some may wonder why they are not created in every case.

2.25 To some extent their absence must be attributed to lack of foresight on the part of vendors and purchasers (and their advisers) at the time of the sub-division of land. But

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29 Section 53 of the Act; and see s. 148(2)(xxxv).

simple lack of foresight may not be the only reason for the omission. In many cases those concerned, though recognising the possible need for access, have assumed that good neighbourliness would in practice ensure that it would always be given.

2.26 In other cases, we suspect - and this is an important point - the parties have decided not to create these rights because of the deleterious effect they might have on the neighbouring land over which they would be exercised. In practice the rights, if given at all, would have to be relatively inflexible and absolute. As a result the strip of neighbouring land to which access was given might at worst become "sterilised": no one would dare to build on it lest the building interfered with the access, or the access with the building. It is precisely for this reason that we are led to seek a solution to the problem in a flexible, discretionary scheme[30] which does not suffer from these drawbacks - a scheme of a kind which parties could not create for themselves even if they wished to do so.

2.27 It remains to add that in many cases rights of entry were not created because they could not be created: when a plot of land was first sold off for building purposes, all its boundaries might not have abutted upon other land owned by the vendor, so that it was not within his power to grant the appropriate rights.

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30 See Part 5 of this paper.

PART 3 THE QUESTION OF PRINCIPLE: SHOULD THERE BE SOME GENERAL MEANS OF OBTAINING ACCESS?

3.1 Having indicated the nature of the problem posed in our terms of reference and given an outline of the present law, we must consider whether any general means of obtaining access ought in principle to be proposed.

The case of favour

3.2 The problem of rights of access was referred to us primarily because of the steady trickle of cases in which members of the public or their Members of Parliament have approached the Lord Chancellor's Department, or us, about actual difficulties caused by lack of access, or in which such difficulties have become known through newspaper and other publicity. It seems likely, however, that these cases are only a small sample of those in which actual difficulties exist. Sometimes the facts of an individual case themselves suggest this: in one instance a complainant said that she had consulted a solicitor and had been told not only that there was no solution to the problem but that the solicitor himself was experiencing it in relation to his own house. It is important to realise, however, that cases of actual difficulty must themselves be very few compared with the number of cases in which the difficulties, though at present only potential, may become actual at any time.

3.3 We are concerned with all those cases in which the lack of a right of access is liable to cause difficulty, whether or not it is currently doing so. In these days of intensive housing development, the potential need for rights of access must be very common indeed; but their existence is more the exception than the rule. To some extent the need may be reduced, at least in the case of detached buildings erected in comparatively recent years, by planning controls which can be exercised so as to prevent building close to a boundary; but the problem remains substantial nonetheless. It is also true, of course, that cases of potential need may never become

cases of actual difficulty. For one thing, the work for which access would be required may in fact never become necessary. And for another, access may in fact be permitted quite readily even though no right of access exists. This latter point is of particular significance. It is probable that, unless the work involved real inconvenience or the risk of damage, most neighbouring owners would allow access whether or not they were legally obliged to do so (or would come to some other amicable arrangement - for example, that the neighbouring owner himself should do the work, subject to reimbursement). But although these two factors may serve to prevent the potential difficulty caused by lack of access rights from developing into an actual one, they do not by any means dispel it. The situation in all such cases is necessarily precarious and therefore unsatisfactory, because it requires no more than a small change of circumstances, such as a breakdown in a good neighbourly relationship, for real difficulty to arise. We must remember, too, that even though a neighbour may allow access, he is entitled under the present law to demand an exorbitant price for doing so.

3.4 We are also satisfied that the consequences of a lack of access, in cases where one is needed, may be very serious. In John Trenberth Ltd. v. National Westminster Bank Ltd.[31] access was sought in order to repair premises which had become a source of danger. In other cases, although there may be no immediate danger, access is necessary in order to put right a state of affairs which, if uncorrected, will lead in time to a building becoming uninhabitable in whole or in part or to its actual collapse. It is true, of course, that the owner of such a building has at least a theoretical means of escape from his difficulties. As Walton J. said in the case just mentioned:

> "If the building was dangerous, another alternative could easily be to pull it down and start all over again. But, of course, that course would be one which cost ... a great deal of money ...".

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31 (1979) 39 P. & C.R. 104; 253 Estates Gazette 151. See para. 2.3 above.

It is perhaps worth adding that, in so far as access remained unavailable, the new building would have to be smaller than the old or would have to built from the inside. And in many cases, particularly those in which the original building had architectural merit, this course of action would be undesirable and might even be unlawful. All in all, it is clear that this expedient would be much too drastic to provide a practical solution to the problem.

The case against

3.5 The general principle of English law from which this problem arises is that a landlord is entitled to exclude from his land, as trespassers, those whom he does not wish to enter it and to whom he is under no obligation to allow access: this is indeed the foundation of the saying, "An Englishman's home is his castle". The case against the giving of some general right of access is, basically, that it would constitute an unjustifiable erosion of this fundamental principle.

3.6 It is true, of course, that exceptions to the principle have already been made. Many public authorities have statutory rights to enter premises in order to carry out their functions[32]. It could be argued, however, that these exceptions are justifiable only because they are necessary in the interests of the public at large, and that a right of access which operated in favour of private landowners, of which there is no general instance at present[33], would be different in kind. It might also be thought to set an undesirable precedent which could lead in future to still further erosion of the principle.

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32 For example, under the Public Health Act 1936, s. 287, mentioned in footnote 7 above.

33 See paras. 2.1-2.22 above. The rights contained in Parts VI and VII of the London Building Acts (Amendment) Act 1939 (paras. 2.20-2.22 above) are of course restricted to London.

3.7 In support of this view it might be said that no sufficient case had been made out for a change in the law: however great the potential size of the problem, the cases in which it is known to have caused actual difficulty are relatively few. It might also be said that the absence of an express right of access may spring from a deliberate decision not to create one[34], though such a decision will not always be made by mutual agreement.

3.8 We think these points have considerable force and that they should be borne very carefully in mind in considering the nature and the extent of any new right of access which might be brought into being; but we do not think they should be allowed to rule out altogether the creation of such a right. We have two main reasons for taking this view. First, we think it would be misleading to consider a right of this kind as being one purely for the private benefit of individuals: there is an element of public interest involved in ensuring that the stock of housing and other accommodation can be maintained and kept available for use. Second, we think that the fact that most landowners do not in practice object to temporary incursions by their neighbours at times of need goes a very long way towards showing that such incursions are not generally considered to be objectionable. It may be said that it is one thing for a landowner to give access of his own volition, and quite another for it to be forced upon him; but it would be no part of our proposals to force access upon him if he had a good reason for refusing it, and if he had no such reason we think on balance that he should be required to allow it.

3.9 We should be grateful for views on these points. We are conscious, in particular, that the arguments in the preceding paragraph might be considered a little superficial. In many circumstances people may feel a genuine and justifiable reluctance

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34 See para. 2.26 above; but note the point made there that the access scheme envisaged in this working paper is more flexible than any express right which could have been granted.

to allow strangers into their property, particularly when those strangers hold no official position and particularly if a loss of privacy, or even a risk to security, is feared. It is also true that people may have real misgivings about the character and likely behaviour of particular neighbours. Though these factors would hardly be relevant in some cases[35] their relevance would be real enough in others. But the scheme which we propose in Part 5 of this paper would involve a hearing before a tribunal, and in so far as such factors could be adduced in evidence they would be taken fully into account and might lead to access being refused altogether or to stringent conditions being imposed upon it[36]. We do of course recognise that there may be cases in which one neighbour would find it difficult to voice, and still more difficult to substantiate, his misgivings about another; but we do not think that there is any solution to this problem and we doubt whether it is serious enough to outweigh the general desirablility of an access scheme.

Provisional conclusion

3.10 Provisionally, therefore, we conclude that some general means of obtaining access should be brought into being. In the remaining parts of this working paper we consider what form it might take and go on to discuss its details.

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35 They would not seem to arise, for example, if all the applicant wants to do is to site a ladder on his neighbour's path for half an hour in order to refix a gutter while the neighbour watches.

36 See further para. 5.55 below.

PART 4 PRELIMINARY DISCUSSION: WHAT FORM SHOULD THE NEW RIGHT TAKE?

4.1 The simplest solution to the problem posed by our terms of reference would lie in providing simply that a legal right of access to neighbouring land should in future exist automatically in all those cases in which it was required, and be exercisable without more ado whenever it was needed. It is convenient to refer to a right of this kind as an automatic right. But in our view formidable difficulties stand in the way of such a solution.

4.2 It would be necessary, first, to define the work which (in addition to inspection) the automatic right would cover. If it were to serve a useful purpose the right would at any rate have to extend to all necessary work of repair and, probably, to maintenance and decoration. It could of course be limited to the doing of such work at reasonable times and after reasonable notice.

4.3 Much greater difficulties arise in relation to the land to be entered. Here there are two main problems. The first may be illustrated by a question: what if the property were a secret government research establishment, or a railway track used constantly by high speed trains? If the right of access were to be an automatic one, then presumably it could not be allowed to exist at all in cases of this kind. In other words, it would be necessary to exclude entirely those cases where the property was being used in a special way which made a right of access inappropriate (or <u>might</u> make it so - for if the right were automatic, any risk would have to be eliminated). But even if these exceptional cases could be defined and excluded, the second problem would remain. This problem is of much more general application. We do not think an automatic right would be sufficiently useful if it were confined to entry upon land which had nothing on it, in it (including growing things), or near it which was capable of being damaged. Yet if the right were not confined in this way, there would be cases in which unacceptable damage, disruption and inconvenience were caused,

or might be caused, to the neighbouring owner.

4.4 These considerations lead to a question which seems to us crucial: is it possible to frame and define an automatic right of access which, on the one hand, is extensive enough to provide a substantial solution to the problem but, on the other, is not so extensive as to be oppressive or unfair to the owners of the neighbouring land?

4.5 It seems to us that the answer must be, No. Quite apart from the difficulties of definition inherent in drawing any hard and fast line at all, we think there is no satisfactory place at which such a line could be drawn. If we were to eliminate all cases in which access might possibly be prejudicial to neighbouring owners, it would very seriously curtail the usefulness of the right and we should certainly eliminate many cases in which the doing of the work - or at any rate the doing of the work subject to conditions appropriate to the particular circumstances - would in fact be reasonable and perhaps beneficial from the point of view of the community as well as from that of the landowner. In practice no automatic right, if it were to be of any real use, could exclude the possibility of damage to the neighbouring property, so provision would have to be made for compensation in cases where damage was done. Disputes would arise as to the amount of the compensation, and about the precautions which should be taken to guard against damage, and these would have to be resolved. Such considerations lead us to conclude that the right could hardly ever be really "automatic".

4.6 In short, we think that the concept of an automatic right founders on its inflexibility. If some degree of flexibility is required, as we think it is, then this concept must be abandoned in favour of a right which arises only at the discretion of a tribunal of some kind and only upon such

conditions as the tribunal may consider just[37].

4.7 The great advantage of a discretionary right of this kind is that it could be tailored to the individual circumstances of the particular case. It could be refused altogether or granted only upon stringent conditions, including conditions for compensation. As a result the need to draw a clear line would disappear and, with it, the difficulties of doing so.

4.8 Its great disadvantage lies, at first sight, in the fact that the right would in no case be clear and unequivocal. Any landowner who wanted to exercise it would have, in theory, to argue his case before the tribunal and incur the costs, delays and anxieties inherent in doing this. In practice, however, we do not think this would be so. In a very large number of cases we think that the mere existence of a right to apply to the tribunal would be enough to secure the necessary access. If a neighbour had no good reason for refusing access, his choice would lie between giving way gracefully at the outset, and fighting a battle which would almost certainly end not only with an adverse decision but with an award of costs against him[38]; and he would seldom choose the latter course.

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37 It would be possible for a right to be automatic in another and more limited sense - namely, that it would exist and be exercisable unless the neighbouring owner, on receiving prior notification, objected to it, in which case the matter would be referred to the tribunal. In practice, however, a scheme of this kind would be the same as the scheme discussed in Part 5 of this paper but with the inclusion of a "deemed consent" provision of the kind discussed in para. 5.53 below.

38 See para. 5.56 below.

PART 5 THE DETAILS OF THE PROPOSED NEW SCHEME

5.1 For the reasons given in the preceding part of this working paper, a scheme embodying a discretionary element seems to us to provide the only realistic solution to the problem. In essence it would entitle a landowner to seek from a tribunal a right of access to neighbouring property for the purpose of inspecting or doing specified work on his own, and it would empower the tribunal to refuse the right, to grant it, or to grant it upon specified conditions. This part is devoted to consideration of the details of a scheme of this kind.

The work

5.2 For what kind of work should an applicant be entitled to seek a right of access? If the right is to be discretionary rather than automatic, it can be argued that there is no need to restrict the category of eligible work. We think it right nonetheless to draw a distinction, at least for the purposes of discussion, between what may for convenience be called preservation work on the one hand, and new building work on the other. Preservation work - for which we put forward a fuller definition in paragraphs 5.4-5.7 below - would comprise mainly work done for the preservation of existing buildings. New building work, by contrast, would include the construction of entirely new ones.

5.3 It can be argued that a right to apply for access for new building work would be useful to developers and that (bearing in mind the tribunal's discretion[39] and its proposed power to impose conditions, including conditions as to compensation[40]) an application of this kind would not be granted unless the neighbouring owner would be unaffected or could be adequately protected. On the whole, however - although we would welcome views on this question - we think that work of this kind

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39 The guidelines proposed for the exercise of this discretion are set out in para. 5.54 below.

40 Paras. 5.14(g) and 5.15 below.

should be excluded. Our reasons include the following:

(1) The complaints which gave rise to our present terms of reference had nothing to do with work of this kind: they related solely to preservation work. We think there would be disadvantages, and perhaps dangers, in proposing a remedy which is wider than the ill which it is designed to cure.

(2) Although the line between new building work and preservation work may be difficult to draw with precision, the difference between the two is in principle a difference of kind and not merely of degree. To see this one has only to ask whether good neighbourly relations would normally be enough at present to ensure that access was given. In relation to preservation work, we think the answer is, Yes. In relation to new building work, we think it is more probably, No. For this reason, our scheme would have to treat new building work differently in various ways. Thus, the criteria for the tribunal's decision[41] would have to be different: in particular, the test of reasonable necessity would be inappropriate; and there should probably be no presumption, even prima facie, in favour of access being granted in any circumstances[42]. Compensation would have to be calculated according to different principles[43]. And this in turn

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41 See para. 5.54 below.

42 Even so, unscrupulous developers might use the mere existence of their right to apply for access as a lever to extract an agreement for access from an unadvised neighbour.

43 As to compensation, see paras. 5.14(g) and 5.15 below. But if the grant of access enabled a new development to take place, or to take place more cheaply, it would probably be reasonable for the neighbour to expect a payment, not on the ground that he had suffered damage requiring compensation, but simply on the ground that access had enabled the developer to make a profit, or a larger profit than he could otherwise have made: cf. Stokes v. Cambridge Corporation (1961) 13 P. & C.R. 77, at pp. 90-92.

would probably affect the composition of the class of persons who should be parties to the proceedings[44]. The whole scheme would be more complicated.

(3) We have already noted[45] that in London, Part VI of the London Building Acts (Amendment) Act 1939 contains comprehensive provisions designed expressly to enable a landowner who is erecting a new building to build up to, or on, the boundary between his land and that of his neighbour: there are, for example, provisions whereby the foundations may project into the neighbouring land[46]; and there are full ancillary rights of access[47]. If a facility of this kind were to be made available to landowners all over the country, this should in our view be done through the extension of the comprehensive London provisions[48], and not by means of the much narrower and more limited scheme for access which we are now considering.

5.4 Having reached the broad provisional conclusion that the present scheme should extend only to preservation work and not to new building work, we must specify more exactly what we mean by preservation work.

5.5 Buildings, etc. In regard to buildings, our provisional view is that it should comprise, first, the inspection, decoration, cleaning, care, maintenance and repair of any building, fence, wall or other thing constructed on or

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44 See paras. 5.28-5.37 below.

45 Para. 2.22 above.

36 Section 45(1)(c).

47 Section 53; and see s. 148(2)(xxxv).

48 We suggested that this might be done in our Working Paper No. 36 (paras. 45-51; and see Proposition 1 on pages 66-69), but of course it would be well beyond our present terms of reference.

under the land, including the strengthening of foundations and the making good of lost support or shelter[49]. This is of course the category of work for which access is in practice most often required. We think, however, that a second category of work should also be included - namely the demolition of any of the things mentioned above and, if desired, its rebuilding or replacement. If a building has become altogether unsafe or has deteriorated (perhaps because access has not hitherto been available) to a point at which rebuilding is the only practicable course, we think there is a good case for allowing access for these purposes. But we think it should be made clear that the work must not be such as to produce something substantially larger in size or different in character, because this would clearly take us over the boundary between preservation work and new building work. We think this must mean that work of substantial extension would necessarily be excluded. It is less easy to decide to what extent alterations and improvements should be within the definition. We suggest later[50] that an applicant should be obliged to show that the work he wants to do is reasonably necessary: and this could hardly be said about improvements and alterations done for their own sake. On the other hand, we see no reason why, for example, a window which has to be replaced should not be replaced with a better one, or why a house which has to be rebuilt should not incorporate improvements, provided the

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49 The reference to foundations, support and shelter is inserted in case there should be any doubt as to whether the preceding words included them. Cases of subsidence occurring in dry weather some years ago give point to the first of these three items. As to support or shelter, these may be lost through the activity (or inactivity) of the neighbour himself. Unless an actual right of shelter or support for a building has been acquired, the neighbour will be under no duty to make good this loss or even to allow the owner of the building access to do so himself. In our view, a right to seek access should therefore be included in the present scheme. It would of course exist equally in cases where there was a positive right to shelter or support and would thus supplement the existing right of abatement: see paras. 2.17-2.19 above.

50 Para. 5.54 below.

criteria suggested above are complied with. We would welcome views on these points.

5.6 Growing things.- It is for consideration whether work of an analogous kind[51] in connection with trees, hedges and other growing things should be included. There is an obvious case for this in some circumstances (for example, a dangerous tree) and we are inclined to think that growing things in general should be within the eligible category.

5.7 Ancillary.- We think that the right of access, if granted, should extend to anyone reasonably engaged by the applicant in connection with the work; and we think it should include a right, while the work is going on, to place on the neighbouring land any materials and equipment needed in the course of the work, and anything emanating in the course of the work from the land being worked on - for example, a wall which is demolished or a tree which is felled.

The property to be entered

5.8 We have pointed out that the property to which access is required may vary widely and that some kinds of property would have to be excluded altogether from any scheme which embodied an automatic right of access. It can perhaps be argued that property of certain types, or property vested in certain specific types of owner[52], ought to be excluded even

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51 We would envisage the work comprising the inspection, pruning (including root pruning), lopping, cutting back, care and treatment of anything growing on the land; and the removal, felling and grubbing out of any such thing and its replacement with something of the same or similar character; but not the planting of any such thing where there was none before or the replacement of any such thing with something of dissimilar character.

52 Our provisional view is that the scheme should bind the Crown, though we are aware that security considerations might sometimes arise. The provisions of the London Building Acts which relate to buildings and structures do not bind the Crown (London Building Acts (Amendment) Act 1939, s. 151), but these provisions are much less discretionary than the scheme which we are proposing.

from a discretionary scheme of the kind we are now considering. Our own view, however, is that one of the main advantages of the scheme is precisely that it obviates the need for limitations of this kind: the tribunal could consider each case on its merits and would refuse an order in those cases (and only in those cases) in which refusal was justified.

5.9 Our provisional conclusion, therefore, is that the scheme should extend to permitting entry upon anything within the legal definition of land, whether it is to the side of or below the land of the person seeking access, and whether it consists of land in the colloquial sense or of structures which in law form part of it.

5.10 We would suggest also that the tribunal should have power to authorise the demolition or removal of anything which stands in the way of access[53]. This may seem at first sight a startling suggestion, but it is made in the context of a discretionary scheme under which the application could be refused altogether[54] or granted subject to stringent conditions (including the full reinstatement of the thing demolished) and to the payment of compensation[55].

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53 It is important that this should not result in the loss of any right (e.g., a right of light to a greenhouse) enjoyed in relation to a thing temporarily removed or demolished in this way, or interfere with the acquisition of any such right in course of being acquired; but we are satisfied that this would not be so: see, e.g., Gale on Easements (14th ed., 1972), pp. 318-320 and 152 (referring to s. 4 of the Prescription Act 1832).

54 Guidelines for the exercise of the court's discretion are set out in para. 5.54 below.

55 It must also be remembered that the thing demolished may be no more substantial or valuable than a lean-to shed and that (but for this provisional conclusion) it might have been put there for the express purpose of frustrating access.

Conditions

5.11 It is of course the possibility of tailoring the conditions upon which a right of access is granted to meet the circumstances of the individual case which provides one of the main attractions of a discretionary scheme.

(a) An automatic condition: making good

5.12 There is much to be said for the view that one condition at least should apply automatically unless it is expressly excluded by the parties or by the tribunal: namely, that the property entered should be fully reinstated, and any damage made good, as soon as possible. This condition is one which ought clearly to apply save in the most exceptional circumstances[56], and we do not think it should need to be expressly imposed or agreed.

(b) Other conditions

5.13 We think it important that the tribunal should have a wide power to impose further conditions. It seems to us (though we should welcome views, both on these points and on the provisional list of conditions which follows) that the owner of the land to be entered has a legitimate interest in minimising inconvenience and loss of privacy, security risks, damage and the risk of damage or of personal injury; in ensuring that the work is done properly and quickly; and in obtaining compensation if this is appropriate.

5.14 We think that the tribunal should have a general power to impose any conditions designed to serve these ends, and that this power should specifically include the imposition

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56 For example, the access might involve the demolition of a structure which is already dangerous and requires demolition, or of a structure which the neighbouring owner does not want replaced.

of covenants dealing with the following matters:

(a) Commencement, duration, hours of work, etc.- We think the tribunal should have full power to impose conditions as to the timing of the work - for example, that it should begin within a certain time (or that it should not begin until after a certain date), that it should be completed within a specified period, or that it should take place only during specified hours of the day or on specified days of the week.

(b) Method to be employed.- If the work can be carried out in more ways than one, it should be possible to impose a condition that it be done in some particular way.

(c) Limits of access.- We think it should be possible for the tribunal to impose a condition that access is to be allowed only to a limited and specified area of the neighbouring property and that no one engaged on the work should go beyond this area (except, perhaps, for specified and limited purposes).

(d) Precautions and safeguards.- The tribunal should also have powers to prescribe safeguards and precautions designed to eliminate or reduce the risk of damage or injury, or to take account of security risks.

(e) Neighbour's supervision of work, and approval of contractor.- It should in our view be possible to impose conditions that the work (or certain aspects of it) should be done under the supervision, and perhaps to the reasonable satisfaction, of the neighbouring owner or of a surveyor or architect employed by him; and, if appropriate, that the choice of contractor to carry out the work should be

subject to the approval of the owner or other such person.

(f) Payment of fees.- Conditions should be capable of requiring the applicant to pay the fees of any surveyor, architect, solicitor or other adviser reasonably employed by the neighbouring owner in connection with the application for access or to exercise supervision over the work (whether or not the supervision is the subject of a condition).

(g) Compensation.- We think the tribunal should have power to impose a condition for the payment of compensation. This topic deserves more detailed discussion, however, and we consider it more fully in the paragraph which follows. The tribunal could order compensation to be paid before the work began, in so far as it was assessable at that time.

(h) Giving security.- We think the tribunal should also have power to require the applicant to give security, before the work began, for any money to become payable subsequently. This would include compensation and fees, in so far as they were not payable beforehand. We think it should also include the likely cost of complying with the automatic condition for making good.

5.15 We now turn to the subject of compensation. We start from the proposition that the neighbouring owner should be entitled to compensation for any loss, and for any real nuisance or inconvenience which he suffers. So far as we can see, this means in practice that compensation should be capable of award under the following three headings:

(i) Compensation for nuisance and inconvenience.- It can be argued that some payment, if only a token one, should always be made for access even if it

involves no real nuisance or inconvenience to the neighbour, and we should be grateful for comments on this point. For ourselves, however, we doubt whether this would be right: we think the idea that access of itself requires compensation makes sense only in the context of the present law of trespass, which we suggest should be modified. On the other hand, our provisional view is that compensation should be available for any actual nuisance or inconvenience suffered by the neighbour through the access or through the doing of the work itself. This should clearly be so if, for example, the drive leading to the neighbour's garage were blocked for some time, if the work generated a great deal of dust which penetrated living accommodation, or if the work required the temporary removal of a greenhouse or rendered living accommodation temporarily unusable. We would not wish the availability of compensation under this heading to lead to the making of claims or awards for trivial inconvenience; but we think that there would be many cases in which the de minimis principle would be invoked in order to refuse an award. And in cases where each of two neighbours might require access to the other's land, it would be in the interests of neither to behave unreasonably in this respect.

(ii) Compensation for physical damage.- We think that physical damage done to the neighbouring property which cannot or should not be catered for merely by the condition for making good should clearly be eligible for compensation.

(iii) Compensation for financial damage.- We also think that compensation should be capable of award in respect of financial damage - for example, loss

of trade suffered while the work is in progress (if there is a business on the neighbouring property) or a permanent fall in the value of the neighbouring property as a result of the work. A fall of this kind would be very unlikely, however, if new building work were excluded from the scheme as we have proposed[57].

The compensation should be assessed in the same way as damages are assessed in tort generally[58].

(c) The rationale of the conditions

5.16 One point remains to be made in connection with the conditions. The basic purpose of our scheme is to authorise the access, not to authorise the doing of the work itself. And if anyone had power to prevent the doing of the work as such (as for example the applicant's landlord might have, by virtue of a term of the tenancy), then that power would remain despite the scheme. But it is impossible to draw a firm line between the work and the access for all purposes, because the tribunal, in deciding whether to grant the access, must obviously consider the nature and extent of the work. Access to replace a gutter might be reasonable when access to rebuild a house would not be. Furthermore, access to rebuild a house might be reasonable if, but only if, the tribunal could impose conditions relating not only to the access but to the doing of the work. It is for this reason that we have included conditions relating to the work in the two preceding paragraphs. It should be noted in particular that the power to award compensation is to include compensation for nuisance or inconvenience caused by the work as well as that caused by the access. We emphasise these points partly in order to shed light upon the purposes which the conditions are intended to serve and partly in order to pave the way for the proposals

57 Para. 5.3 above.

58 As to the assessment of damages under head (i), see Bone v. Seal [1975] 1 W.L.R. 797 (C.A.).

made in paragraphs 5.38-5.40 of this paper.

The nature of the right

5.17 It is of the essence of the discretionary scheme which we are putting forward that the right of access granted should be a right to enter for the purpose only of carrying out one particular project of work, the details of which are settled in advance. It follows that if the same landowner should wish at some future time to have access to the same neighbouring land in order to do other work (however similar), he would have to apply for it anew.

5.18 It is true that it might in some cases be convenient if a permanent or semi-permanent right could be granted. Why, for example, should not a landowner be granted a right of access upon certain conditions to paint his house this year and in any subsequent year in which such access should be needed? But we think there are good reasons for confining the right to a single project. Otherwise it would amount in effect to a full easement which was acquired compulsorily but for private purposes. To propose a right of that kind would be controversial. Many questions of a technical nature would also arise. Would the permanent right enure for the benefit only of the applicant himself or for that of others interested in the land and his and their successors? Would it bind all those with interests in the neighbouring land, and their successors? It seems to us undersirable to complicate an essentially simple scheme with questions of this kind.

5.19 A permanent right seems also to be unnecessary, because if a right of access has been awarded in the past the neighbouring landowner will realise that it is likely to be awarded again in the future and so will normally grant access voluntarily - unless circumstances have changed in some relevant respect. And if they have changed it seems to us that he should have power to seek a renegotiation of the terms of access and if necessary to have the matter submitted again to the tribunal's discretion.

It must be remembered that a permanent right granted upon unalterable terms might have the effect of paralysing the use or development of the neighbouring land.

Persons entitled to apply for access

5.20 Our provisional view is that the class of persons entitled to apply for a right of access under the scheme should comprise

> first, any person who is in occupation of the property in question or of any part of it, and
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> second, any other person who has (or who shares) a legal estate in the property in question or any part of it.

We discuss these two groups below.

5.21 Occupiers.- The first group is a wide one. It includes everyone in occupation of the property or any part of it. We would propose to leave the word "occupier" undefined. It would naturally include all those in occupation by virtue of having some estate or interest in the property, or by virtue of a contract or of any statutory right to remain in occupation[59]; but it would also include anyone else in occupation - for example, someone in course of acquiring a title by adverse possession. It seems to us that all such persons should have the right to apply for access. In saying this we bear in mind that the work for which access is required

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59 Cf. para. 5.31 below. We are conscious that the word "occupier", by itself, may have different meanings in different contexts, but we think its use here would cause no problems in practice - particularly since the class of people who actually wished to do work on the property (or to pay for it) would be inherently limited.

may be trivial in the extreme - for example, re-fixing a fallen gutter. In practice, however, it must be remembered that not all of these persons would wish to incur the trouble or expense of doing work on the property, and not all would be entitled to do such work even if they wished. There is no suggestion that the obtaining of a right of access by an applicant as against his neighbour should confer any right (as against his landlord, for example) actually to do the work. This is a quite separate question, and must remain so.

5.22 Legal estate owners.- There is a group of persons who should clearly be entitled to seek access even though they are not in occupation, but we think they are confined to owners of a legal estate (whether freehold or leasehold) in the property to be worked upon. It is obvious, for example, that a landlord (whether he be a freeholder or a mesne tenant) may have a good reason, and may indeed be under a duty to his tenant or to his own landlord, to keep the property in repair; and such a person should be entitled to seek access for the purpose. But it seems to us that the relevant category can be confined in the way we have suggested, though we would of course welcome comments.

5.23 The persons entitled to seek access should of course include all those who may be statutorily required to do work on their properties[60].

Persons against whom the application should be made

5.24 We have now to consider a difficult question: if there are several persons interested in different capacities in the land to which access is required, which of them should be involved in the proceedings taken to obtain a right of access?

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60 Cf. footnote 7 and para. 2.21 abvoe.

(a) Who can sue for trespass?

5.25 It is necessary to remember that the reason why an access scheme is needed at all is that entry would otherwise amount to a trespass. It must therefore be at least relevant to consider who could sue under the present law for the trespass thus committed.

5.26 The answer to this question seems simple when stated in general terms. Clerk & Lindsell on Torts[61] puts it thus:

> "Trespass is actionable at the suit of the person in possession of land. A tenant in occupation can sue, but not a landlord except in cases of injury to the reversion."

Unfortunately, however, the legal concept of "possession" is not a simple one, and the same textbook has to devote thirteen paragraphs to an explanation of this and other problems inherent in the principle just stated. Possession is by no means synonymous with occupation. Thus a person may be legally in possession of property although someone else (or no one at all) is in occupation of it. Again, a person may in some circumstances be in possession although he has no enforceable right to possession; but conversely a person who has a right to possession is not necessarily in possession, though if and when he does take possession his possession is said to relate back to the time when the right accrued, so that he can sue for any trespass committed in the intervening period.

5.27 The rules about possession (of which those mentioned above are only examples) are such that they would create a two-fold difficulty if they were used to designate the respondents to an application for access: the applicant would have a problem not only in understanding them but also in ascertaining all the facts necessary to apply them in a given situation. It must also be remembered that our scheme is designed to provide a simple remedy for someone who wants a right of access in order to do work which is probably of a minor character and will not of itself permanently impinge

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61 (14th ed., 1975), para. 1318.

on, make use of or alter the property of the neighbouring owner[62].

(b) The respondent class

5.28 We therefore think that the persons whom an applicant should be required to involve in access proceedings should be defined with relative simplicity and ascertainable with relative ease. For convenience we shall call them "the respondent class".

(i) The primary category: occupiers

5.29 Our provisional view is that the main category of persons within the respondent class should comprise (subject to exceptions to be mentioned in the next paragraphs) those in occupation of any part of the neighbouring land affected by the access sought. The test of "occupation" is much easier to apply than that of "possession"[63]: though an applicant might have difficulty in ascertaining the identities of those in legal possession of the property next door, he would usually know who was actually there. In the overwhelming majority of cases, moreover, the occupiers would be the only persons affected by the work. It is noteworthy that both section 287 of the Public Health Act 1936[64] and section 9 of the London County Council (General Powers) Act 1955[65], which give rights of access for the repair of dangerous structures, provide that

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62 In this respect the purpose of our scheme differs radically from that of Part VI of the London Building Acts (Amendment) Act 1939, which sets out mainly to give the building owner a right to do work affecting the neighbouring property which he would not otherwise be entitled to do. Those provisions require the involvement of the "adjoining owner", defined to include "every person in possession or receipt either of the whole or of any part of the rent or profits of any land or tenement or in the occupation of any land or tenement otherwise than as tenant from year to year or for any less term or as a tenant at will" (London Building Act 1930, s. 5, applied by s. 1 of the 1939 Act). This definition deliberately excludes certain kinds of occupier and includes persons with less immediate interests - a policy which is understandable in the context of the 1939 Act but which would, in view of the difference just mentioned, be inappropriate in the present context.

63 Cf. the speeches in the House of Lords in Williams & Glyn's Bank Ltd. v. Boland and Williams & Glyn's Bank Ltd. v. Brown [1980] 3 W.L.R. 138.

64 See footnote 7 above.

65 See para. 2.21 above. See also London Building Acts (Amendment) Act 1939, s. 141(2).

preliminary notice (when it is required at all) is to be served simply on "the occupier".

5.30 We think, however, that the category of occupiers who fall within the respondent class should be limited in two ways.

5.31 First, it should be limited to those who are in occupation by virtue of having some estate or interest in the property, or by virtue of a contract or of any statutory right to remain in occupation. These last words would include statutory tenants and spouses with rights of occupation under the Matrimonial Homes Act 1967. This limitation is designed to exclude those (normally including children of a family, for example) who are not in occupation by virtue of any right of their own.

5.32 Secondly, it should not include any person who would have no right to sue for trespass in respect of the access sought. This second limitation is logically necessary, because it would make no sense to require the involvement of someone who would have no legal redress if he were not involved; but in practice it would serve to exclude few people[66] who were not excluded by the first limitation.

5.33 It is important to emphasise that these two limitations are not proposed with the intention of requiring the applicant to look into the title to the neighbouring property, still less to consider the intricacies of the law of trespass. His application would not be prejudiced because he had involved persons whom he did not need to involve[67], and if in doubt he could simply involve all the occupiers and have done with it.

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66 But it would serve, for example, to exclude a lodger, who cannot sue for trespass: Clerk & Lindsell on Torts (14th ed., 1975), para. 1323.

67 Nor, of course, would a person outside the respondent class acquire any legal locus standi merely because he had been served.

(ii) Possible extensions of the respondent class

5.34 We must now consider whether persons not falling within the primary category just described ought to be involved in particular circumstances. We have in mind three cases which might require this.

5.35 The present law of trespass draws a distinction between cases in which trespass causes damage which is such as to affect the value of the reversion[68] and other cases. In the latter cases only the person in possession may sue; but in the former the reversioner may also do so. It seems to us that a similar distinction should be drawn for our purposes. Provisionally, therefore, we propose that, in cases where the work for which access is sought is such that there is a real risk of damage which (if not made good) would substantially reduce the value of an estate or interest in the land owned by someone[69] not falling within the primary category, that person should also be included in the respondent class (unless his interest is merely that of a beneficiary under a trust[70]). Under provisional recommendations made later[71] such a person would be able, whether or not he was within the respondent class, to enforce any conditions which affected the access and which he had an interest in enforcing; and these would include

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68 See Clerk & Lindsell on Torts (14th ed., 1975) para. 1327.

69 It is for consideration whether the applicant should have some special means, through the service of notices on occupiers and others, of ascertaining what estates and interests subsisted in the land and who was entitled to them. But it would be difficult to devise sanctions to ensure the co-operation of the recipients, and our preliminary view is that the practical usefulness of such a facility would not be sufficient to justify its creation.

70 If a beneficiary under a trust fell within this category, the trustees would also fall within it, and we think it is they rather than their non-occupying beneficiary who should be entitled to participate in the proceedings.

71 Paras. 5.67-5.69 below.

the automatic condition for making good[72]. But the question here is whether he himself should have the right to participate in the proceedings in order to request the imposition of certain particular conditions, or indeed to oppose access altogether; and in our view he should.

5.36 The second case is that in which the land to be entered is not, at the relevant time, in the occupation of anyone. On the one hand it may be argued that if there are no occupiers, and if the case is not of the kind described in the preceding paragraph, there is no reason why anyone should be involved in the proceedings - or why there should be any proceedings - and the applicant should be entitled simply to enter and do the work without more ado. The automatic condition for making good[73] would apply in any event and could be enforced by anyone with an interest in enforcing it[74]. On the other hand it may be thought wrong to give the applicant what amounts to a licence to enter at will without obtaining either the consent of anyone or an order from a tribunal. Views are invited as to whether this would indeed be wrong and, if so, how the difficulty could be overcome. The applicant could perhaps be required to apply by himself (ex parte) for an order of the tribunal. As an alternative, it might be possible to designate someone to act as respondent in these particular circumstances. This might be the owner of the land (or someone with a specified interest in it); but it would often be very difficult to ascertain his identity. On the other hand, it might perhaps be the local authority; but we think it would be difficult for an outside body to play a role of this kind.

5.37 The third case arises where the respondent class may alter between the commencement of the proceedings and the completion of the work. This is a particularly intractable

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72 This condition would apply in all cases unless expressly excluded: see para. 5.12 above.

73 Para. 5.12 above.

74 Paras. 5.67-5.69 below.

problem, because the change may not be forseen and, even if it is, no one may know the identities of those who will come within the respondent class because of it. For this reason, a right of access might in the end be exercised against someone who did not know that it had been granted. There is of course nothing in the law of trespass to help here, because trespass is a wrong which can be stopped at once by anyone entitled to stop it. We are concerned, by contrast, with work which may continue for weeks or even months but must be sanctioned in advance. For ourselves we are inclined to think that if the applicant involves those who are within the respondent class at the outset, he should not be prejudiced by future changes in its composition. Newcomers would be entitled to enforce any conditions to which access was subject [75]. But we should be grateful for views on this point.

(c) No one but the respondent class should have an action in trespass or nuisance in respect of work within the scheme or in respect of access for it

5.38 It seems to us that the provisional conclusions reached in the preceding paragraphs clearly involve the consequence that, where land is entered for the purpose of carrying out work within the scheme, the only persons able to sue in trespass (or to obtain an injunction) in respect of this access should be members of the respondent class. If the applicant obtained the consent of all such members, or obtained an order from the tribunal in proceedings involving them all, he should have nothing to fear from anyone else.

5.39 It also seems to us, however, that we must go further than this. We have already explained[76] that the tribunal, in deciding whether to grant access, must consider the nature and extent of the work which is to be done and that it may impose conditions (including conditions for the payment of compensation) relating to the work as well as to the access. Inasmuch,

75 Paras. 5.67-5.69 below.

76 Para. 5.16 above.

therefore, as the details of the work itself are within the purview of the tribunal, we think that the applicant's immunity - from actions by anyone within the respondent class whose consent he has, or against whom an order has been obtained, and from actions by anyone outside the respondent class - should also extend to the work as well as to the access.

5.40 It is necessary, however, to be more specific about the kind of actions from which the applicant should be immune. They are, we think, confined to actions for trespass and for nuisance. In relation to the work itself, nuisance would normally be the only relevant cause of action. We are not suggesting that the applicant should be immune from all actions in tort: clearly he ought still to be liable for negligence. Nor are we suggesting that he should be immune from other actions: if someone (for example, the applicant's landlord) has a valid right, by contract or covenant, to prevent him doing the work at all, that right should continue to exist. All we are suggesting is that access exercised or work done, within the scheme and in accordance with any conditions imposed, should not involve any risk of liability for trespass or nuisance at the suit of anyone interested in the neighbouring land[77] - unless that person is within the respondent class and has not consented nor had an order made against him.

(d) Applicant's right to seek a stay of proceedings taken by members of the respondent class

5.41 If the applicant omitted to involve some member of the respondent class, he might be faced, duing the execution of the work, with an action for trespass or nuisance by that person. His omission might have been inadvertent, occasioned perhaps by genuine difficulty in identifying the respondent class. In any case, it would be inappropriate for such an action to proceed to a conclusion if the circumstances are such that an order for access could, or might, have been obtained against the plaintiff if one had been sought. We therefore

77 If the work caused a nuisance actionable at the suit of other people living in the area, liability to them would of course remain.

propose that the applicant should in these circumstances have a right to apply to the court for an order giving him leave to seek an access order against the plaintiff, and staying the action in the meantime. This right would be analogous to that given in similar circumstances by section 84(9) of the Law of Property Act 1925[78].

Deciding the issues

5.42 We now consider the way in which the issues arising out of an application for a right of access should be decided.

(a) The tribunal

5.43 Assuming that the matter is not resolved by agreement but reaches the tribunal, what tribunal should it be? In answering this question we have to bear in mind that many of the matters coming before the tribunal will relatively small, involving simple (but perhaps urgent) questions about work of no great cost arising between ordinary householders whose financial circumstances are modest, but perhaps not modest enough to make them eligible for legal aid. For preference, therefore, the tribunal should be local and accessible, and its procedure speedy and economical. At the same time we must remember that some of the matters to be decided may be of greater complexity and financial significance, and that the tribunal must be suitable to deal also with those. The choice seems to us to lie between the courts and the Lands Tribunal.

(i) The courts

5.44 So far as the courts are concerned, those to which a matter of this kind could appropriately be assigned would be the county courts and the High Court[79]. It would be desirable to arrange the jurisdiction in such a way that all (or all but

78 Section 84 gives power to the Lands Tribunal to discharge or modify restrictive covenants, and the right mentioned in the text arises when proceedings are taken to enforce such a covenant.

79 We do not think that the magistrates' courts would be an appropriate forum for the wide range of cases under this scheme.

the largest and most complicated) cases went to the county courts: otherwise the criteria mentioned in the preceding paragraph would not be fulfilled. This could perhaps be done by laying down some automatic criterion for jurisdiction, possibly based upon the likely cost of the work to be done rather than upon the rateable values of either of the properties involved. But any test of this kind would have its difficulties and we are inclined to think that it might be better to give the county court an unlimited and exclusive jurisdiction, coupled perhaps with a power to transfer cases to the High Court (or possibly to the Lands Tribunal[80]) if it saw fit. We think the county courts would be suitable for our purpose as regards speed, cost and the provision of local hearings, and we are inclined to consider them, on balance, the best available forum. But an alternative possibility would be to give initial jurisdiction to the Lands Tribunal, and to this we now turn.

(ii) The Lands Tribunal

5.45 The Lands Tribunal is an independent judicial body set up by the Lands Tribunal Act 1949 for the purpose of determining a wide range of questions relating to valuation of land, compensation for compulsory acquisition of land, rating appeals and the discharge or modification of restrictive covenants. Since then its jurisdiction has been extended in several ways - for example, to the determination of the price to be paid by a leaseholder exercising rights to acquire the freehold under the Leasehold Reform Act 1967. Members of the Tribunal include both lawyers and surveyors, and it has power to award costs in any proceedings before it. It hears cases not only in London but at convenient centres throughout England and Wales. We understand that local hearings, which are not costly, can be arranged with little delay. The major item of costs consists of course in the cost of legal or other representation (if any): in this respect the Tribunal has different scales of costs for large and small cases. The fact

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80 See para. 5.45 below.

that the Lands Tribunal includes surveyors among its members seems to us to give it one possible advantage over the courts, in that some of the cases arising under our scheme might be more suitably determined by surveyors than by lawyers. But we think the Lands Tribunal would appear more remote to users of the scheme than would the county courts, and a serious drawback would be the fact that it has no local offices where informal advice could be obtained, proceedings instituted and interlocutory work handled.

5.46 Although our present preference is for the county courts, we have reached no final conclusion and should be grateful for comments on the issues involved. References in this paper to "the tribunal" should be interpreted accordingly.

(b) A preliminary procedure?

5.47 We have stressed that we would expect most applications for access to be settled between the parties without resort to the tribunal. We now consider whether there should be some some special preliminary procedure to achieve this end.

(i) The London Building Acts procedure

5.48 We have already mentioned[81] section 46 of the London Building Acts (Amendment) Act 1939, which enables one landowner ("the building owner") to do certain work on walls and other structures built on the boundary between his land and that of his neighbour ("the adjoining owner"). The procedure to be followed by a building owner who wants to do this work is laid down in sections 47, 48, 49 and 55 and is one which might be considered in the present context. It may be summarised very briefly as follows:

> (i) Unless written consent is first given to the work in question, the building owner must serve on the adjoining owner a notice containing details of the work and saying when it is to begin. (There are provisions as to the time at

81 Para. 2.22 above.

which this notice must be served and the time within which the work must be begun.)

(ii) The adjoining owner then has the right (on complying with certain time limits) to serve a counter notice. This has a limited function, being designed only to enable the adjoining owner to require that the building work should incorporate certain features for his benefit.

(iii) If the adjoining owner has not given written consent to a notice, or the building owner has not given written consent to a counter notice, within fourteen days after service, a difference is deemed to have arisen between them.

(iv) This difference is resolved in the first instance by a single surveyor (if the parties can agree upon one) or (if they cannot) by three surveyors, one appointed by each party and the third appointed by the first two. The surveyor or surveyors then settle the details of the work to be done and the conditions upon which it is to be carried out. There are full ancillary provisions covering various contingencies.

(v) Either party then has a right to appeal to the county court or, in certain circumstances, to the High Court.

5.49 If this London Building Acts procedure were to be adapted for our present purposes, it might be desirable to modify it in certain respects. As to sub-paragraph (v), the tribunal to which the appeal took place would of course depend upon the factors discussed in paragraphs 5.43-5.45 above, and might possibly be the Lands Tribunal rather than the county court. Again, we think that the counter notice described in sub-paragraph (ii) would be out of place in the present context: in the absence of the full machinery of Part VI of the 1939 Act, the neighbouring owner could not normally make use of any features of the kind there mentioned. But it might well be desirable to provide for the service of a counter notice of a rather different kind - namely, one prescribing the conditions (other than the automatic condition for making good[82] and any

82 Para. 5.12 above.

other conditions offered in the notice itself) on which he would consent to the work being done.

(ii) The advantages of a preliminary procedure

5.50 Bearing these points in mind, we should welcome views as to whether it would be advantageous in the present context to have a preliminary "filtering" procedure of this kind.

5.51 For ourselves, we certainly think that there would be advantage in requiring the applicant to serve a notice on the adjoining owner as a first step. (We have pointed out already[83] the most adjoining owners are in practice willing to give informal permission for access for inspection or small works, and we should not aim in any way to prevent this: the formal notice would be required only when informal consent was not immediately forthcoming and the new procedure had therefore to be set in motion[84].) The notice would contain a full description of the work which the applicant wanted to do and of the conditions which he was prepared to accept. If the recipient agreed, the matter would end there. We think there would also be advantages in allowing the recipient to serve a counter notice in which he could propose that the work be modified or the conditions altered or extended. If a counter notice was served, and its contents agreed, the matter would go no further.

5.52 But if notice and counter notice (if any) failed to produce agreement, we doubt whether the matter should go to a surveyor or surveyors, as in the London Building Acts procedure: we are inclined to think that it should go direct to the tribunal. It seems to us that this would achieve finality more quickly, and that it would be less expensive, at least if

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83 Para. 3.3 above.

84 See also paras. 5.61-5.69 below.

there was no legal representation at the hearing and surveyors were not retained to give evidence. It is true, however, that in other circumstances a decision by surveyors might well be less expensive - provided, of course, that it was not followed by an appeal. We would welcome views on these points. A possible middle course would be to provide not only that the matter should be referred first to surveyors but also that the surveyors' decision should be final and that appeal should not be allowed, save only perhaps on a point of law. Our own provisional view is against this latter possibility, but comments would be welcomed.

(iii) "Deemed consent"

5.53 For the sake of completeness, we would mention one radical variation of the London Building Acts procedure which might be considered, though our own provisional view is not in favour of it. If the recipient of an applicant's notice failed to respond within the relevant period, his silence could be taken as consent instead of refusal, so that the applicant could proceed with the work without more ado. Such a provision would probably be unfair unless actual receipt of the notice could be proved; and even then we think it might produce injustice. The applicant, after all, would not be bound by any conditions (except the automatic one for making good and any others he had offered in his notice) and a recipient who did not fully understand what was happening might by mere inaction bring upon himself inconvenience and loss.

(c) Guidelines

5.54 We now turn to consider whether it would be desirable to provide guidelines in accordance with which the tribunal (and surveyors, if the matter were first referred to them) should reach their decision. We doubt whether it would be practicable to lay down detailed guidelines; but we think that the following propositions should be stated in the

implementing legislation:

> First, that an applicant, to succeed in his application, must always show that the work he wants to do is reasonably necessary[85] and that it could not be done, or would be substantially more difficult or more costly, without the access he seeks.
>
> Second, that if the applicant shows this, and no one within the respondent class puts forward any substantial objection which cannot be met by the imposition of conditions[86], a right of access should be granted (subject to any conditions which may be appropriate) unless the tribunal sees some special reason to the contrary.
>
> Third, that if someone within the respondent class puts forward a substantial objection which cannot be met by the imposition of conditions, a right of access should be granted only if the tribunal considers the need for access to be exceptionally great (having regard to the importance and necessity of the work and to the impossibility, difficulty or cost of doing it in any other way) and that it is in all the circumstances justified to grant it.

5.55 In addition to the more concrete objections to access which a neighbour might raise, we are conscious that he might sometimes be concerned about loss of privacy and about the security risks involved in strangers being allowed to enter his land and perhaps to enter or inspect his house or other buildings. Objections on these grounds would of course be taken into account and evaluated by the tribunal. Sometimes

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85 This requirement would have to be modified if it were decided to include within the scheme alterations and improvements done for their own sake: see para. 5.5 above.

86 Conditions can of course include a condition for the payment of compensation: paras. 5.14(g) and 5.15 above.

they could be met by the imposition of conditions[87]. Sometimes they might result in the application being refused altogether. We gave consideration to the idea that, in such circumstances, the tribunal should have power to refuse access to the applicant on condition that the work was done (at the cost of the applicant) by the neighbour himself, or by a contractor engaged by him. But this, besides complicating the scheme, would create practical problems. In particular, the applicant would seldom be willing to meet the cost of the work unless he could inspect it when it was finished and perhaps also while it was being done; and that would go some way towards destroying the purpose of such an order. However, there would of course be nothing to prevent the parties from agreeing privately upon an arrangement of this kind.

Costs

5.56 The tribunal and (if an initial reference to surveyors were to be required) adjudicating surveyors[88] should of course have a discretion as to costs. We think this discretion would be exercised in such a way as to ensure that an applicant who made a plainly hopeless application would normally have to bear the costs of both sides, and that the same would go for a respondent who contested an application which was clearly bound to succeed. This latter point is an important one because the whole scheme might founder if every application were contested, and the threat of costs is the only available deterrent to unreasonable refusals. But this is not to suggest that costs should automatically follow the event: even if the application succeeded, the tribunal or surveyor should be free, if the respondent is considered to have acted reasonably, to make no order as to costs or even to order the costs of both sides to be paid by the applicant.

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87 E.g., conditions (a), (c), (d) and (e) in para. 5.14 above.

88 Awards by surveyors under the London Building Acts procedure may include an award of costs: London Building Acts (Amendment) Act 1939, s. 55, para. (1).

Enforcement

5.57 We now turn to the question of enforcement of the right of access, and of any conditions to which access may be subject.

(a) Enforcement of the right

5.58 The scheme which we are considering is not one which involves any automatic right of access: it merely allows an applicant to apply for such a right. However, once his application has succeeded the right should arise and should be enforceable as such.

5.59 The first question is when, for this purpose, his application should be said to have succeeded. Clearly it has done so if and when the tribunal makes an order in his favour. If the scheme is to embody a preliminary notice and counter notice procedure and a preliminary reference of disagreements to surveyors, then an enforceable right should also arise, in our view, if the notice and counter notice procedure serves to produce agreement for access, or (subject to any appeal to the tribunal) when an adjudicating surveyor gives a decision in favour of the applicant.

5.60 If a right under the scheme has come into existence in any of these ways, we think it should be enforceable in the same way as if it were an enforceable right of access expressly granted. If the access is wrongfully prevented, the primary means of enforcement would be to obtain an injunction[89]. The remedy of damages should also exist, and any damage suffered by the applicant through the denial of access, once a right of access had arisen, should be recoverable.

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89 In certain circumstances the person who had the right of access would also be entitled to remove anything put there to obstruct his exercise of the the right, by way of abating the nuisance. See paras. 2.17-2.19 above.

5.61 But a clear distinction must be drawn between these cases and a case in which one neighbour simply accedes to another's informal request for access, as may often happen today. Unless the machinery of the new scheme is invoked - by a formal notice under the the implementing legislation, or (if there is to be no preliminary notice procedure) by a formal application to the tribunal - the question whether or not any dealings between the parties which may have taken place outside it have served to create an enforceable right should in our view be left to the existing law.

(b) Enforcement of conditions

5.62 Under this heading, there are three separate questions to be considered.

(i) When do the conditions arise?

5.63 Under our earlier suggestions[90], the conditions - with one exception - will arise only if and when they are imposed by order or agreed between the parties. The exception is the condition for making good[91]: this will not require agreement or imposition, but will apply automatically unless expressly excluded. We have still to deal, therefore, with the exact circumstances in which this condition should apply.

5.64 We do not think its application should be confined to those cases in which the machinery provided by the scheme is actually utilised. In our view it should apply whenever neighbouring land is entered for the purpose of doing work for which the scheme could be invoked[92], whether it is in fact invoked or not.

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90 Paras. 5.11-5.16 above.

91 Para. 5.12 above.

92 I.e., work within the definition considered in paras. 5.5-5.7 above.

5.66 Our main reason for making this wide provisional recommendation arises from the fact that access may very often be granted simply as the result of an informal request made by one neighbour to another. Many such cases occur today, and we have expressed the hope[93] that the mere existence of the scheme will serve to increase their number in future. But it is important, precisely for this reason, that no one should be worse off because the matter is dealt with informally. Since we consider that the condition for making good is one which ought in fairness always to apply (unless expressly excluded), it would be illogical not to apply it in these informal cases. It is true, of course, that its application would sometimes be unnecessary because the parties would themselves have agreed, expressly or impliedly, that a condition of this sort should form part of their bargain. But we think that the position of someone who grants access should be safeguarded by a clear requirement to make good in all cases unless some specific agreement is made to the contrary.

5.66 We have a second reason[94] for making the provisional recommendation in paragraph 5.64 above, but in order to explain this we must first discuss another question to which we now turn.

(ii) Who can enforce the conditions?

5.67 We do not think that those entitled to enforce the conditions, whether express or automatic, can be confined to the respondent class[95]. Such confinement would of course be right if no one outside the respondent class could ever be prejudiced by their non-enforcement; but this is not so. Suppose, for example, that the neighbouring property is occupied by a tenant who is the sole member of the respondent class and

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93 Para. 4.8 above.

94 See para. 5.69 below.

95 The composition of the respondent class is considered in paras. 5.28-5.37 above.

who consents to access. The applicant enters and does the work but fails to clear away the large piles of rubble to which it gives rise. In the meantime the tenancy ends and the tenant leaves. In such circumstances the landlord of the property might clearly be prejudiced if he could not enforce the condition for making good. So might a new tenant of that property. And so, to take another example, might an owner who took occupation of previously unoccupied land.

5.68 All these people and others like them may have good reasons for wanting to enforce the condition for making good and some or all of the other conditions which may apply. We therefore suggest that an independent right to enforce the conditions should be enjoyed by anyone interested in the neighbouring property who can show that he would be prejudiced by their non-enforcement.

5.69 Clearly, however, this right to enforce the conditions is of no use unless there are conditions to enforce. This brings us to our second reason for making the wide recommendation contained in paragraph 5.64 above. We have already pointed out that entry may take place as the result of a request made informally. If the automatic condition for making good did not apply in such cases, the effect would be to deny its benefit both to those inside the respondent class and to those outside it. Thus in the example given in paragraph 5.67 above (where piles of rubble were left on the neighbouring land after the completion of the work), neither the original tenant nor the landlord nor the incoming tenant would be able to enforce the condition because there would be no condition to enforce. It is important to realise, too, that none of these people would be entitled to sue for trespass either, because we have already made a provisional recommendation[96] that if the work in question falls within the ambit of the scheme then (whether the scheme is actually utilised or not) no one outside the respondent class should be entitled to sue for trespass or nuisance. It is all the more essential, therefore, that the condition for making good should apply in cases of this kind.

96 Paras. 5.38-5.40 above.

It is indeed essential that it should apply even in cases where no permission for access is sought at all, because those who are interested in the neighbouring land should not be worse off in those circumstances. The provisional recommendation made in paragraph 5.64 above is therefore wide enough to cover this point. It follows that if it were considered right to allow access to unoccupied land without the consent of anyone[97], the condition would still apply and could be enforced by any person interested in the land who would be prejudiced by its non-enforcement.

(iii) How can the conditions be enforced?

5.70 For this purpose, conditions attached to a right of access fall into two categories: those to be observed before the right is exercised at all, and those to be observed during the work or upon its completion. As to the first category, failure to comply with such a condition would prevent the right of access from being exercisable at all and entry in purported exercise of it would be a trespass for which the normal remedies would be available.

5.71 The second category presents a little more difficulty. We think it would be appropriate first to negative in this context the rule of law arising from the Six Carpenters' Case[98] which Clerk & Lindsell[99] expresses in this way:

> "Where a person having entered upon land under authority given by law subsequently abuses this authority he becomes a trespasser ab initio, his misconduct relating back so as to make his original entry tortious."

This rule, though it applies only if the misconduct amounts to positive misfeasance as distinct from mere non-feasance, seems

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97 See para. 5.36 above.

98 (1610) 8 Rep. 146a. Some doubt was cast on the rule in Chic Fashions (West Wales) Ltd. v. Jones [1968] 2 Q.B. 299, especially by Lord Denning M.R. at p. 313.

99 Clerk & Lindsell on Torts (14th ed., 1975) para. 1339.

to us inappropriate in the context of our scheme. Nor do we think that it would be appropriate for a breach of condition to entail the automatic cessation of the work; for this might be in no one's interests. On the other hand, we think the neighbour should have power to apply to court for an injunction stopping the work or for an injunction (including a mandatory injunction) to enforce the condition itself. Its breach should also give rise, in appropriate cases, to an action for damages or debt; and of course it might entail the forfeiture of any security which had been given by the applicant.

Contracting out

5.72 It is appropriate finally to consider how far, if at all, it should be possible by agreement to negative the right to apply for access under the scheme we are considering. Our provisional view is that any agreement having this effect should be unenforceable. We have two reasons, one of principle and the other of a purely practical nature.

5.73 The reason of principle is that we think it desirable, not only from the point of view of individuals but from that of public policy, that a right to apply for access should be available in case of need. If contracting out were permitted, we think the right might be relinquished ill-advisedly or even under pressure from a vendor in a superior bargaining position. It is impossible to foresee all the situations which housing needs might in future produce, and if an owner surrendered the right he (or his successors in title) might well regret it later. The position might be different if we were envisaging an automatic right of access; but the discretionary scheme is designed to take into account all the circumstances at any given time, and we think it should be allowed to fulfil this function.

5.74 The practical reason is this. There may a number of people currently within the class entitled to apply for access under the scheme[100], and a number of people currently within

100 Paras. 5.20-5.23 above.

the respondent class[101]. A contracting out agreement would be most unlikely to have involved all of them and might well have involved none of them. Although in these circumstances the law would no doubt determine (or could be made to determine) how far each of these people was bound by, or could enforce, the earlier agreement, it is probable that some of them would know nothing about the agreement and, even if it occurred to them to investigate the matter, would find it difficult to discover whether there was one or not.

5.75 In the nature of things, an attempt to contract out of the scheme would not be found in any document which had come into existence prior to the implementing legislation. Admittedly, if such a document contained a number of specific rights but omitted a right of access, it might be possible to draw the inference that the parties had made a conscious decision not to include one, but in our view this would be little more than speculation and should not stand in the way of a general prohibition on contracting out of the scheme. Our provisional view is therefore that nothing contained in any document, whenever made, should be effective to exclude the scheme. By the same token we consider that if a document (past or future) conferred some right of access, that right and the scheme should operate side by side: if the right were less favourable than the scheme, there seems no reason why the scheme should be excluded.

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101 Paras. 5.28-5.37 above.

PART 6 SUMMARY OF THE ISSUES

We end with a summary of the main issues and questions raised in this working paper on which we would welcome comments, and we should be particularly grateful if commentators would mention any factors or arguments which we may have overlooked.

THE PROBLEM

(1) Our terms of reference require us

> "to consider the legal difficulties of those who, lacking a legal right to do so, need to enter upon another's land in order to inspect or do work upon their own, to consider whether these difficulties can be remedied by legislation and to make recommendations."

(paragraphs 1.1 and 1.2)

SHOULD THERE BE SOME GENERAL RIGHT OF ACCESS?

(2) Having discussed the terms of reference briefly (paragraphs 1.3-1.7) and considered the existing law about access to neighbouring land (Part 2), we conclude that the problem referred to in our terms of reference is, at least potentially, a widespread one and that it may have serious consequences in individual cases. Though reluctant to erode still further the principle that an Englishman's home is his castle, we reach the provisional conclusion that landowners should have some general means of obtaining access to neighbouring land in order to do work on their own property. We seek views as to whether this is acceptable, bearing in mind that the right would be limited in the ways summarised below. (Part 3)

WHAT FORM SHOULD THE NEW RIGHT TAKE?

(3) We consider the possibility of giving landowners an "automatic" right to enter neighbouring land whenever the need

arises. But we conclude provisionally that it would be impossible to frame an automatic right of access extensive enough to provide a substantial solution to the problem, but not so extensive as to be oppressive to neighbours. We therefore favour a right which would arise only at the discretion of a tribunal, and only upon such conditions as the tribunal considered just. This would not mean that every case would go to the tribunal, because the mere right to apply would usually be enough to secure the necessary access; but it would give neighbouring owners the opportunity to object or to require conditions. (Part 4)

THE DETAILS OF THE PROPOSED NEW SCHEME

(4) The remainder of the working paper (Part 5) is devoted to a consideration of the details of a discretionary scheme.

The work

(5) We reach the provisional conclusion that the work for which access could be sought under the scheme should not include the erection of a new building but should extend only to "preservation work". We think that this should comprise:

> (a) the inspection, decoration, cleaning, care maintenance and repair of any building, fence, wall or other thing constructed on or under the land, including the strengthening of foundations and the making good of lost support or shelter; and
>
> (b) the demolition of any of the things mentioned in (a) and, if desired, its rebuilding or replacement: but the work should not produce something substantially larger in size or different in character, and extensions would therefore be excluded.

We invite views as to this provisional definition and, in particular, as to whether and how far alterations and improvements should be within the definition. Our provisional view is that they should

not be eligible if made for their own sake, but that there is no reason why they should not be carried out in the course of work for which there is an independent need. (paragraphs 5.2-5.5)

(6) Our provisional definition would also extend to work in connection with things growing on land and to certain ancillary matters, such as the placing of materials on the neighbouring land during building operations. (paragraphs 5.6 and 5.7)

The property to be entered

(7) Although neighbouring land may be used in such a way that access to it clearly ought not to be allowed, we think there is no need, if the scheme is to be discretionary in any case, to make express exclusions in this respect. (paragraph 5.8)

(8) Provisionally, therefore, the scheme would extend to permitting entry upon anything within the legal definition of land, whether it is to the side of or above or below the land of the person applying for access, and whether it consists of land in the colloquial sense or of structures which in law form part of it. (paragraph 5.9)

(9) Since conditions as to reinstatement and compensation could be imposed (see paragraphs (10) and (11) of this Summary), we think the tribunal should have power, in an appropriate case, to authorise the demolition or removal of anything standing in the way of access. (paragraph 5.10)

Conditions

(10) If a right of access arises under the scheme, we think that one condition should apply automatically unless excluded by the parties or the tribunal: that the neighbouring property should be fully reinstated and any damage made good as soon as possible. (paragraph 5.12)

(11) We also think that the tribunal should have a wide power to impose further conditions. The purposes which these would serve are set out in paragraph 5.13; and the suggested conditions themselves are listed and considered in paragraph 5.14 under the following headings:

Commencement, duration, hours of work, etc.
Method to be employed
Limits of access
Precautions and safeguards
Neighbour's supervision of work, and approval of contractor
Payment of fees
Compensation
Giving security.

The types of compensation for payment of which a condition could be imposed are:

Compensation for nuisance and inconvenience
Compensation for physical damage
Compensation for financial damage.

We would welcome views on all these matters, including the question whether some payment, if only a token one, should always be made for access, whether or not it gives rise to nuisance or inconvenience. (paragraphs 5.13-5.16)

The nature of the right

(12) We think that the scheme should operate to provide a right of access for the purpose only of carrying out a single project of work, the details of which are settled in advance. (paragraphs 5.17-5.19)

Persons entitled to apply for access

(13) Our provisional view is that those entitled to apply for a right of access under the scheme should comprise

(i) any person who is in occupation of the property in question or of any part of it, and

(ii) any other person who has (or who shares) a legal estate in the property in question or any part of it.

This classification is discussed in paragraphs 5.21-5.23, and views are invited as to its correctness. (paragraphs 5.20-5.23)

Persons against whom the application should be made

(14) The question considered under this heading is: if there are several persons interested in different capacities in the land to which access is required, which of them should be involved in the applicant's proceedings? (paragraph 5.24)

(15) Since it is the law of trespass which now prevents access, it might seem sensible to propose that those to be involved in proceedings should be those who could sue for the trespass under the present law. Our provisional conclusion, however, is that the intricacies of the law of trespass are such that this would put too great a burden on the applicant. Provisionally, therefore, we propose that those to be involved (to whom we refer as the "respondent class") should be defined in such a way as to be ascertainable with relative ease. (paragraphs 5.25-5.28)

(16) We would welcome views on our provisional conclusion that the primary category of people within the respondent class should be those in occupation of any part of the neighbouring land which is affected by the access sought; but that:

(a) the only occupiers needing to be involved should be those who were in occupation by virtue of having an estate or interest in the property, or by virtue of a contract or of any statutory right to remain in occupation; and

(b) it should be unnecessary to involve any occupier who could not have sued in

trespass in respect of the access sought.

(paragraphs 5.29-5.33)

(17) It is for consideration whether the respondent class should be extended (or some other special arrangement made) in the following circumstances:

(a) Where the work for which access is required is such that there is a real risk of damage which (if not made good) would substantially reduce the value of an interest in the neighbouring land belonging to someone who is not an occupier. Our provisional view is that such a person should be within the respondent class, unless his interest is that of a beneficiary under a trust. Is this right; and should the applicant have some special means of ascertaining his identity? (paragraph 5.35)

(b) Where the land to be entered is not in the occupation of anyone at the relevant time. If the case does not fall within sub-para. (a) above, should the applicant then be entitled to enter without more ado? If not, should the applicant be required to apply by himself (ex parte) to the tribunal; or should someone be specially designated as respondent (and, if so, who)? (paragraph 5.36)

(c) Where the composition of the respondent class may alter between the commencement of the proceedings and the completion of the work. Can any provision be made for this case, bearing in mind that the change may not be foreseen and, even if it is, no one may know the identities of those who will come within the respondent class because of it? (paragraph 5.37)

(18) We suggest that if work falls within the terms of the scheme, neither the doing of the work nor entry for that purpose should involve any risk of liability for trespass or nuisance at the suit of anyone interested in the neighbouring land - unless that person is within the respondent class and has not consented or had an order made against him. (paragraphs 5.38-5.40)

(19) We also propose that if the applicant failed to obtain the consent of, or an order against, some member of the respondent class, and that person took proceedings against him for trespass or nuisance in respect of his entry, the applicant should have a right (analogous to that in section 84(9) of the Law of Property Act 1925) to apply to the court for an order giving him leave to seek an access order against the plaintiff, and staying the action in the meantime. (paragraph 5.41)

Deciding the issues

(20) As to the identity of the tribunal, we think the choice lies between the Lands Tribunal and the courts, of which the county court would in practice have to be given jurisdiction in most cases. Our own tentative preference is for the latter, but we should welcome views on this point. We should also be grateful for views as to whether the county court's jurisdiction should be determined by some automatic criterion, based perhaps on the cost of the proposed work, or should be unlimited and exclusive (coupled perhaps with a power to transfer cases to the High Court, or possibly to the Lands Tribunal). (paragraphs 5.42-5.46)

(21) We should also be particularly grateful for views on the question whether there should be some preliminary procedure applicable in the early stages of an application and designed to avoid the need for a hearing by the tribunal. In paragraphs 5.48 and 5.49 we outline a procedure laid down for a similar purpose in Part VI of the London Building Acts (Amendment) Act 1939, and suggest some possible modifications. In paragraphs 5.50-5.52 we consider whether such a procedure would be of advantage in the present context. Very briefly

it would involve:

(a) an initial notice and counter notice procedure whereby the applicant and members of the respondent class might reach agreement about access and the conditions for it; and

(b) a further stage whereby, if agreement was not reached, the matter would be referred to a surveyor or surveyors, whose decision would be binding subject only to an appeal to the tribunal.

Our provisional view is in favour of stage (a) but against stage (b). (paragraphs 5.47-5.52)

(22) It would be possible to modify stage (a) of the procedure outlined in paragraph (21) of this Summary so that if the recipient of an applicant's notice failed to respond within a specified period, his silence would be taken as consent; but our provisional view is that this might be unfair. (paragraph 5.53)

(23) We next consider whether the scheme should prescribe guidelines according to which an adjudication should be made. Our provisional view is that detailed guidelines would serve no useful purpose, but that it would be desirable to make three general propositions clear:

First, that an applicant, to succeed in his application, must always show that the work he wants to do is reasonably necessary and that it could not be done, or would be substantially more difficult or more costly, without the access he seeks.

Second, that if the applicant shows this, and no one within the respondent class puts forward any substantial objection which cannot be met by the imposition of conditions, a right of access should

be granted (subject to any conditions which may be appropriate) unless the tribunal sees some special reason to the contrary.

Third, that if someone within the respondent class puts forward a substantial objection which cannot be met by the imposition of conditions, a right of access should be granted only if the tribunal considers the need for access to be exceptionally great (having regard to the importance and necessity of the work and to the impossibility, difficulty or cost of doing it in any other way) and that it is in all the circumstances justifiable to grant it.

Views on these propositions are invited. The requirement that the work should be reasonably necessary would have to be modified if the scheme were to extend to alterations and improvements done for their own sake; see paragraph (5) of this Summary. (paragraph 5.54; and see paragraph 5.55)

Costs

(24) The tribunal (and any adjudicating surveyor) should, we think, have a full discretion as to costs. We think the discretion would be exercised so as to ensure that an applicant who made a plainly hopeless application would normally have to bear the costs of both sides, and that the same would go for a respondent who contested an application which was clearly bound to succeed. But this is by no means to suggest that a successful applicant would always obtain costs. (paragraph 5.56)

Enforcement

(25) If a right of access arises under the scheme (by the order of the tribunal or an adjudicating surveyor, or as the result of a notice and counter notice procedure), we think it should be enforceable in the same way as if it were a right expressly granted: by injunction and (if the applicant suffers damage through the subsequent denial of access) by an action for damages. (paragraphs 5.58-5.61)

(26) As to conditions, our provisional conclusions are:

(a) Although express conditions arise only as the result of an adjudication or by agreement between the parties, the automatic condition for making good should arise whenever land is entered for the purpose of doing work within the scheme (and even if the scheme itself is not invoked). (paragraphs 5.63-5.66)

(b) Any conditions which apply should be enforceable not only by those for whose benefit they originally arose but also by anyone interested in the neighbouring property who can show that he would be prejudiced by their non-enforcement. (paragraphs 5.67-5.69)

(c) In the context of means of enforcement, the conditions to be enforced should be considered in two groups. A failure to perform a condition which is required to be performed before the right is exercised at all would prevent the right from becoming exercisable, and its purported exercise in such circumstances would be a trespass. Non-compliance with other conditions should, we think, entitle the neighbour to seek an injunction stopping the work or an injunction (including a mandatory one) to enforce the condition itself. Its breach should also give rise to an action for damages or debt in appropriate cases; and it might entail the forfeiture of any security which the applicant had given. (paragraphs 5.70-5.71)

Contracting out

(27) Our provisional view is that any agreement which would have the effect of preventing an application under the scheme should be unenforceable. This would apply even to agreements made before the scheme came into force. (paragraphs 5.72-5.75)

Comments are invited on all these points, and on any others which may be considered relevant.

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